

KUMAR GURUSAMY

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v.

KOPERASI JIMAT-CERMAT DAN PINJAMAN
KERETAPI BHD

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COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
ZAINUN ALI JCA
ZAHARAH IBRAHIM JCA
[CIVIL APPEAL NO: W-02-772-09]
18 OCTOBER 2010

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ADMINISTRATIVE LAW: *Rules of natural justice - Right to be heard - By-law of co-operative society providing for removal of member - By-law silent as to member's right of being heard before removal of membership - By-law not expressly excluding member the opportunity of being heard - Whether member had a right to be heard before being removed from membership - Whether rules of natural justice applicable*

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STATUTORY INTERPRETATION: *Aids to construction - Maxims of construction - 'Expressio unius est exclusio alterius' - Application of - Construction of by-laws - By-laws inconsistent with principal Act - Whether maxim applicable*

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UNINCORPORATED ASSOCIATIONS: *Societies - Co-operative Societies - Membership - By-law of co-operative society providing for removal of member - By-law silent as to member's right of being heard before removal of membership - By-law not expressly excluding member the opportunity of being heard - Whether member had a right to be heard before being removed from membership - Whether rules of natural justice applicable*

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The appellant was a member of the respondent - a cooperative society - and had taken a loan from the respondent. His membership with the respondent was later terminated, apparently on the basis that he had failed to pay two monthly instalments on the loan. The appellant referred the matter to the Cooperative Tribunal which concluded that his membership had been wrongly terminated and ordered his reinstatement. The respondent appealed to the High Court which allowed the appeal. The High Court held *inter alia* that once the appellant failed to pay his loan instalments to the respondent for two consecutive months, he became disqualified and

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- A could then be removed from membership. The court held that applying the maxim *expressio unius est exclusio alterius*, the rules of natural justice had been excluded by the words of the respondent's by-laws, and that a member being removed from membership under cl. (2) of by-law 20 had no right to be heard. The appellant thus
- B appealed to the Court of Appeal.

Held (allowing the appeal with costs)

Per Zaharah Ibrahim JCA delivering the judgment of the court:

- C (1) By-law 22 of the respondent's by-laws deals with a member's misconduct and prescribes a two-stage process for expelling a member. However, under by-law 20 cl. (2), the respondent's Board is required to remove a member if the member falls within any of the three paragraphs of cl. (2). The Board is thus
- D required to determine whether the basis for the removal exists. Pure reliance on the society's records, as in the instant case, is not adequate. (paras 10-14)
- E (2) Since by-law 20 does not expressly exclude an opportunity to be heard from being given to a member, the High Court judge should have approached the matter by considering whether it would be consistent with the rules of natural justice, that a person who may or may not be disqualified is removed from membership without the member being given the opportunity to be heard - as under cl. (2) of by-law 20 - whereas a person
- F guilty of misconduct and who acts in a manner prejudicial to the respondent is provided two opportunities to be heard - as under by-law 22 - and could only be expelled by the votes of two-thirds of the delegates present at a general meeting. (para 15)
- G (3) It is incumbent upon the respondent to take all reasonable steps to ensure that the affected member is in fact disqualified before removing him from membership. The Board should bring to the notice of the affected member that it has grounds for believing
- H that the member is disqualified under the relevant provision of the by-law, and that unless the contrary is shown, he would be removed from membership. That notice would afford the member the opportunity to refute the allegation of his disqualification. Such notice was not given to the appellant in
- I the instant case. (paras 17 & 18)

- (4) Several by-laws of the respondent were inconsistent with provisions of the Co-operative Societies Act 1993. These inconsistencies underscored the danger of erroneously construing cls. (2)(a) and (b) of by-law 20 as providing for the automatic removal of a member purportedly for being disqualified, without giving him an opportunity to be heard. (paras 19-38) A B
- (5) In light of the inconsistencies the maxim *expressio unius est exclusio alterius* should not have been applied to exclude the rules of natural justice. (para 42)

Bahasa Malaysia Translation Of Headnotes C

Perayu adalah ahli responden - sebuah koperasi - dan telah mengambil pinjaman dari responden. Keahliannya telah dibatalkan, atas dasar bahawa beliau telah gagal membayar dua ansuran bulanan ke atas pinjaman. Perayu merujuk halperkara ini kepada tribunal koperasi yang memutuskan bahawa keahliannya salah dibatalkan dan memerintahkan bahawa beliau dilantik semula. Responden merayu kepada Mahkamah Tinggi yang membenarkan rayuan. Mahkamah Tinggi memutuskan antara lain bahawa oleh kerana perayu gagal membayar ansuran bulanan kepada responden dua bulan berturut-turut, beliau menjadi tidak layak dan keahliannya boleh diambil. Mahkamah memutuskan dengan memakai maxim *expressio unius est exclusio alterius*, kaedah-kaedah keadilan asasi telah dikeluarkan oleh perkataan-perkataan undang-undang kecil responden, dan seorang ahli yang keahliannya diambil di bawah kl. (2) undang-undang kecil 20 tidak mempunyai hak untuk didengar. Perayu oleh itu merayu kepada Mahkamah Rayuan. D E F

Diputuskan (membenarkan rayuan dengan kos)

Oleh Zaharah Ibrahim HMR menyampaikan penghakiman mahkamah: G

- (1) Undang-undang kecil 22 dari undang-undang kecil responden mengendalikan dengan salah laku ahli dan menentukan satu proses dua peringkat dalam pembuangan seorang ahli. Walaubagaimanapun, di bawah undang-undang kecil 20 kl. (2), lembaga responden diwajibkan membuang ahli jikalau ahli tersebut terjatuh di bawah tiga perenggan kl. 2. Lembaga oleh itu diwajibkan untuk membuat penentuan sama ada wujudnya dasar untuk pembuangan. Hanya dengan merujuk kepada rekod-rekod koperasi, seperti di dalam kes ini, adalah tidak memadai. H I

- A (2) Oleh kerana undang-undang kecil 20 tidak secara dengan nyata mengecualikan peluang untuk didengar bagi seorang ahli, hakim Mahkamah Tinggi sepatutnya menyentuh halperkara tersebut dengan mengambil dalam pertimbangan sama ada ia konsisten dengan kaedah-kaedah keadilan asasi, yang seorang mungkin atau mungkin tidak layak dibuang keahliannya tanpa memberi peluang kepada ahli tersebut untuk didengar - seperti di bawah kl. (2) undang-undang kecil 20 - tetapi seorang yang melakukan tindakan salah laku dan bertindak dengan cara yang boleh memudaratkan responden diberi dua peluang untuk didengar - seperti di bawah undang-undang kecil 22 - dan hanya boleh dibuang dengan undian dua pertiga majoriti para perwakilan yang hadir pada mesyuarat am.
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- D (3) Ia adalah wajib untuk responden mengambil langkah-langkah yang berpatutan untuk memastikan ahli yang terbabit tidak layak sebelum membuang keahliannya. Lembaga sepatutnya memberitahu ahli yang terbabit bahawa terdapatnya alasan-alasan yang membawa kepada kepercayaan bahawa ahli tidak layak di bawah peruntukan yang relevan undang-undang kecil, dan melainkan terdapat pertentangan ditunjukkan, keahlian beliau akan dibuang. Notis tersebut akan memberi peluang kepada ahli untuk menyangkal dakwaan pembatalannya. Notis seperti ini tidak diberi kepada perayu di dalam kes ini.
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- F (4) Beberapa undang-undang kecil responden tidak konsisten dengan peruntukan-peruntukan Akta Koperasi 1993. Percanggahan-percanggahan tersebut menegaskan bahaya salah tafsir klausa-klausa (2)(a) dan (b) undang-undang kecil kerana menyebabkan pembuangan ahli secara automatik kerana hilang kelayakan, tanpa memberi peluang kepadanya untuk didengar.
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- (5) Atas dasar percanggahan-percanggahan *maxim expressio unius est exclusion alterius* tidak sepatutnya digunapakai untuk mengecualikan kaedah-kaedah keadilan asasi.
- H **Case(s) referred to:**
Colquhoun v. Brooks [1887] QBD 400 (*refd*)
- Legislation referred to:**
Co-operative Societies Act 1993, ss. 17, 26(a), (b), (c), 27, 28, 29, 83(7)

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Other source(s) referred to:

F.A.R Bennion, *Statutory Interpretation, a Code*, 2nd edn, p 873

*For the appellant - Dato' Chandran (Ranjan Chandran with him);
M/s Ranjan Chitravathy & Nik*

For the respondent - K Shanmuga; M/s Kanesalingam & Co

[Appeal from High Court, Kuala Lumpur; Originating Motion No: R3(1)-110-04]

Reported by Andrew Christopher Simon

JUDGMENT**Zaharah Ibrahim JCA:**

[1] The appellant was a member of the respondent. He took out a loan of RM2,000 in March 1997 from the respondent and for that purpose entered into a bond undertaking to pay the loan in twelve several monthly instalments as well as an additional subscription apart from the normal monthly subscription. He failed to pay the instalments for the months of September and October 1997. However by the end of the 1997 he had paid more than what he was supposed to have paid as at that point of time.

[2] In the meanwhile, the appellant continued to exercise his rights as a member of the respondent until he was asked to leave the board meeting on 7 March 1998 and was informed that his membership in the respondent had terminated due to the non-payment of the two monthly instalments.

[3] The appellant, being of the view that there was a dispute between him and the respondent, referred the matter to the Cooperative Tribunal who inquired into the matter and concluded that removal of the appellant from the membership of the respondent was wrongful as the appellant was not given a right to be heard. He was ordered to be reinstated. The Tribunal ordered the reinstatement to take effect from the date the appellant paid his outstanding dues to the respondent.

[4] The respondent appealed to the High Court under sub-s. 83(7) of the Co-operative Societies Act 1993 ("the Act") against the decision of the Tribunal. The High Court allowed the appeal.

- A [5] This is the appellant's appeal against that decision of the High Court.

Opportunity To Be Heard Before Removal Under By-law 20(2)

- B [6] The learned High Court judge held that that once the appellant failed to pay his loan instalments to the respondent for two consecutive months, he became disqualified and he could then be removed from membership.

- C [7] The learned High Court judge compared the provisions of cl. (2) of by-law 20 of the respondent's by-laws with those of by-law 22 and found that cl. (2) of by-law 20 is silent with regard to the giving of an opportunity to be heard whereas such opportunity is provided for in by-law 22. He then concluded, applying the maxim *expressio unius est exclusio alterius*, that the rules of natural justice had been excluded by the words of the by-laws, and that a member who is being removed from membership under cl. (2) of by-law 20 has no right to be heard.

[8] By-law 20 is as follows:

- E 20(1) Keanggotaan seseorang anggota terhenti atas sebab-sebab di bawah ini, mengikut mana-mana yang berkenaan:

- (a) mati; atau
- F (b) menarik diri mengikut undang-undang kecil 21; atau
- (c) dibuang mengikut undang-undang kecil 22.
- (2) Lembaga hendaklah menyingkir seseorang anggota yang:
- G (a) didapati membuat ikrar palsu di bawah undang-undang kecil 13; atau
- (b) menurut peraturan 11 Peraturan, hilang kelayakan sebagai anggota di bawah undang-undang kecil 19; atau
- H (c) terhenti keanggotaannya di bawah perenggan (c) fasal (1) undang-undang kecil ini.

[9] By-law 22 reads as follows:

- I 22(1) Jika seseorang anggota melanggar mana-mana peruntukan undang-undang kecil ini atau melakukan mana-mana satu daripada perbuatan-perbuatan berikut:

- (a) merujukkan pertikaian atau aduan kepada mana-mana orang selain daripada Ketua Pendaftar atau tribunal; atau

- | | |
|---|---|
| (b) membuat kenyataan akhbar atau dalam mana-mana media massa mengenai Koperasi ini tanpa kebenaran Lembaga; atau | A |
| (c) membuat tuduhan palsu ke atas anggota Lembaga atau anggota-anggota atau bekas anggota Koperasi sehingga menyebabkan anggota-anggota berpecah-belah dan berpuak-puak; atau | B |
| (d) memburuk-burukkan Koperasi sehingga mencemarkan nama baik dan menjejaskan perniagaan Koperasi ini; atau | |
| (e) bertindak di luar etika mesyuarat agung sehingga menjejaskan perjalanan mesyuarat itu; atau | C |
| (f) tidak dapat dihubungi oleh Lembaga untuk tempoh enam puluh hari | |
| dia hendaklah dianggap telah bertindak dengan cara yang memudaratkan kepentingan Koperasi ini dan bolehlah digantung keanggotaannya. | D |
| (2) Keputusan untuk menggantung keanggotaan seseorang anggota boleh dibuat oleh Lembaga hanya setelah anggota yang berkenaan diberitahu secara bertulis mengenai kesnya dan diberi peluang untuk menyatakan sebab-sebab mengapa keanggotaannya tidak boleh digantung. | E |
| (3) Tiap-tiap kes penggantungan hendaklah dibentangkan kepada mesyuarat agung perwakilan yang terawal dan dijadikan sebagai agenda pertama, dan anggota yang digantung keanggotaannya itu hendaklah diberitahu secara bertulis tidak kurang daripada lima belas hari sebelum diadakan mesyuarat itu. | F |
| (4) Sebelum mengesahkan atau mengetepikan penggantungan itu, mesyuarat agung perwakilan hendaklah mendengar penjelasan anggota yang digantung oleh Lembaga itu, jika dia memilih untuk memberi penjelasan, dan keanggotaannya tidak lucut melainkan jika mesyuarat agung perwakilan dengan undi dua pertiga daripada perwakilan yang hadir membuat keputusan membuangnya. | G |
| (5) Sehingga perkara penggantungan keanggotaannya diputuskan oleh mesyuarat agung perwakilan, anggota yang berkenaan itu tidak mempunyai apa-apa hak dan kewajiban sebagai anggota melainkan hak menyuarakan hal penggantungan keanggotaannya itu di dalam mesyuarat agung. | H |
| [10] By-law 22 deals with a member's misconduct. It is a two-stage process. The first stage involves the discretion of the board to suspend him. He must first be given an opportunity to be heard | I |

- A** before he is suspended. If he is suspended, his suspension must be reported to the earliest general meeting of delegates and the suspension must be the first item on the agenda. At the meeting he is given another opportunity to be heard. The general meeting then decides whether to set aside his suspension or to expel him
- B** from membership. He can only be expelled if two-thirds of the delegates present at the general meeting vote for the expulsion.

- C** [11] Clause (1) of by-law 20 appears to be intended as a “housekeeping” mechanism. It provides that a member who dies, or who resigns or who is expelled by the general meeting under by-law 22 ceases to be a member. In other words, nothing more needs to be done. His name would be taken off the register of members.

- D** [12] Clause (2) of by-law 20 is worded differently. It requires the board to take the step of removing a member if he falls within any of the three paragraphs of that cl. (2). He is to be removed if he has made a false declaration when he applies to become a member, and he is to be removed if he becomes disqualified under by-law 19.

- E** [13] However, for some inexplicable reason, a person whose membership ceases under cl. (1)(c) of by-law 20 (by virtue of having been expelled under by-law 22) must also be removed from membership by the board. This is merely one of the many inconsistencies in the respondent’s by-laws.

- F** [14] As cl. (2) of by-law 20 requires the board to take the step of removing the affected member, in our view the board is required to determine that the basis for such removal exists. Paragraphs (2)(a) and (b) of by-law 20 deal with questions of fact which would require some investigation by the board. It would be quite simplistic to
- G** expect the board to possess all the facts. Even in the case of non-payment of dues or instalments of loan repayments, there is every possibility that payments have been sent by the member but not received by the respondent. Pure reliance on the society’s records, as was done in this case, is not adequate.

- H** [15] As by-law 20 does not expressly exclude an opportunity to be heard from being given to a member, the learned High Court judge should have approached the matter by considering whether it would be consistent with the rules of natural justice that a person who
- I** may or may not be disqualified is removed from membership without the member being afforded the opportunity to be heard

(cl. (2) of by-law 20), yet a person who is guilty of misconduct and who acts in a manner prejudicial to the respondent is provided two opportunities to be heard, and can only be expelled by the votes of two-thirds of the delegates present at a general meeting (by-law 22).

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[16] It must also be pointed out that under by-law 23 of the respondent's by-laws, a member expelled under by-law 22 will be refunded all his monies in the respondent after deducting amounts owed to the respondent, yet a person who is removed under paras. (2)(a) or (b) of by-law 20 has no such right.

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[17] It is therefore incumbent upon the respondent to take all reasonable steps to ensure that the affected member is in fact disqualified before removing him from membership.

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[18] At the very least, the board should bring to the notice of the affected member that it has grounds for believing that the member is disqualified under the relevant provision of the by-law, and that unless the contrary is shown, he would be removed from membership. That notice would afford the member the opportunity to refute the allegation of his disqualification. Such notice was not given to the appellant in this case.

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Inconsistencies With The Act

[19] The provision for the removal of a member under para. (b) of cl. (2) of by-law 20 is not limited to para. (g) of by-law 19. It covers all the instances of disqualification set out in by-law 19.

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[20] It was mentioned in the court below that the by-laws had been adopted by the members at the general meeting and had been registered. As such under s. 17 of the Act the by-laws bind all members. However, an examination of by-law 19 reveals inconsistencies with the Act and raises some doubts whether the by-law had been made with full understanding of the provisions of the Act.

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[21] By-law 19 reads as follows:

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19. **Menurut peruntukan seksyen-seksyen 26, 27 dan 29 Akta,** seseorang anggota akan hilang kelayakannya sebagai anggota jika dalam masa menjadi anggota dia:

(a) hilang kewarganegaraan; atau

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(b) hilang keupayaan dari segi mental; atau

(c) diisytiharkan bankrap; atau

- A** (d) disabitkan atas sesuatu kesalahan boleh daftar;
- (e) dibuang daripada keanggotaan mana-mana koperasi dan suatu tempoh selama satu tahun belum lagi berlalu dari tarikh pembuangan itu; atau
- B** (f) tidak lagi bermastautin atau memiliki tanah atau bekerja dalam kawasan operasi Koperasi; atau
- (g) tidak menjelaskan bayaran yuran atau kekurangan atas bayaran kepada yuran atau pinjaman atau sebarang bayaran yang harus dibayar kepada Koperasi bagi tempoh dua bulan berturut-turut; atau
- C** (h) menerima apa-apa perlantikan tetap yang bergaji dalam Koperasi ini atau koperasi berdaftar yang lain; atau
- (i) telah menjadi anggota koperasi berdaftar lain yang tujuan utamanya ialah untuk memberikan pinjaman kepada anggotanya. [emphasis added]
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E [22] The introductory words of by-law 19 indicate that the by-law is made pursuant to ss. 26, 27 and 29 of the Act. When those introductory words are read together with the circumstances of disqualification set out in paras. (a) to (i) that follow them, they imply that the circumstances set out in those paragraphs are the very circumstances under which a member becomes disqualified in accordance with the provisions of ss. 26, 27 and 29 of the Act. Is that the true position?

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[23] Sections 26, 27 and 29 of the Act are as follows:

Qualification for membership

- G** 26. In order to qualify for membership in a primary society, a person must:
- (a) be a citizen of Malaysia;
- H** (b) have attained the age of eighteen years or, in the case of a school cooperative society, have attained the age of twelve years; and
- (c) be resident or be employed or be in ownership of land within the area of operations of the primary society, or, in the case of a school cooperative society, be a registered student of the school.
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Disqualification for membership

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27. No person shall be eligible for admission as a member of a registered society if:

(a) he is mentally disabled;

(b) he is undischarged bankrupt;

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(c) he is a person against whom a conviction stands for a registrable offence;

(d) he has been expelled from membership under this Act and a period of one year has not elapsed from the date of such expulsion.

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Restriction of membership in society

29. No person shall be a member of more than one registered society whose primary object is to grant loans to its members.

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[24] The appellant's removal is based upon the respondent's contention that he became disqualified under para. 19(g). As mentioned above, by-law 19 purports to derive legitimacy from the three sections of the Act specified therein. However, the circumstances set out in para. (g) (and in para. (h)) of by-law 19 are not among the grounds for disqualification provided for in any of the three sections.

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[25] A more serious inconsistency is paragraph (f) of by-law 19. That paragraph appears to have been included due to a misinterpretation of s. 26 of the Act.

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[26] Under s. 26 of the Act, a person qualifies to be member of a primary cooperative society if he fulfils three conditions.

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[27] The first condition (para. (a) of s. 26) relates to citizenship. He must be a Malaysian citizen.

[28] The second condition relates to age (para. (b) of s. 26). He must have attained the age of 18 years or, in the case of a school cooperative society, the age of 12 years.

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[29] The third condition is a condition which makes a cooperative society what it is. That condition relates to the common interest of the members that brings them together into a cooperative relationship in the form of the cooperative society. Paragraph (c) of s. 26 sets out four broad areas of common interest. A member must:

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- A (c) be **resident** or be **employed** or be **in ownership of land** within the area of operations of the primary society, **or**, in the case of a school cooperative society, be a **registered student of the school**. [emphasis added]
- B [30] As can be seen from the highlighted words above, it is sufficient for the condition of a common interest to be met under para. (c) of s. 26 if any one of the situations set out in that paragraph is met. The word “or” in that paragraph (as opposed to the word “and” appearing at the end of para. (b)), clearly indicates that the four situations in para. (c) are to be read disjunctively.
- C [31] Unfortunately, para. (f) of by-law 19 has placed ALL of the areas of common interest set out in para. (c) of s. 26 (except that of being a registered student) as being conditions which if not met would disqualify members of the respondent.
- D [32] Yet, cl. (1) of by-law 10 appears to have captured the intention of para. (c) of s. 26. It provides that membership of the respondent “terbuka kepada semua individu yang sedang bekerja atau telah bersara wajib dari mana-mana organisasi keretapi yang
- E dikendalikan oleh kerajaan, perbadanan, syarikat swasta dan subsidiary-subsidiarinya”. In other words, by virtue of cl. (1) of by-law 10, the common interest that brings the members of the respondent together is employment with a railway organisation.
- F [33] That part of para. (f) of by-law 19 which disqualifies a member for not being resident or not owning land in the area of operations of the respondent is clearly inconsistent with cl. (1) of by-law 10 and inconsistent with para. (c) of s. 26.
- G [34] The tribunal in their award referred to s. 28 of the Act and by way of analogy compared the appellant’s position to that of a member who has not paid his dues as a member.
- [35] Section 28 of the Act provides as follows:
- H 28. No member of a registered society shall exercise the rights of a member unless and until he has made such payment to the registered society in respect of membership or acquired such interest in the registered society as may be prescribed by the regulations or by the by-laws of such society.
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[36] Unlike ss. 26 and 27 of the Act which deal with qualification and disqualification for membership, s. 28 deals with the exercise by a member of the rights of membership. It should be noted that under s. 28 even non-payment of subscription of shares in the co-operative society is not a ground for disqualification, let alone non-payment of a loan taken from the co-operative society.

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[37] When the appellant obtained the loan from the respondent, he was exercising his right as a member. Paragraph (g) of by-law 19, which renders his non-payment of such loan a ground of disqualification for membership, appears to be inconsistent with s. 28.

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[38] The inconsistencies highlighted above underscore the danger of erroneously construing paras. (2)(a) and (b) of by-law 20 as providing for the automatic removal of a member purportedly for being disqualified without giving him an opportunity to be heard.

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The Application Of The Maxim *Expressio Unius Est Exclusio Alterius*

[39] In his *Statutory Interpretation, a Code*; 2nd edn, F.A.R Bennion, at p. 873, had this to say of the maxim *expressio unius est exclusio alterius*:

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Like all canons of construction the *expressio unius* principle, which Coke gives in the form *designatio unius est exclusio alterius*, operates only where not outweighed by other interpretative factors.

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[40] He went on further to state that:

Need to apply the *expressio unius* principle is usually a symptom of what in this work is called disorganised composition. Such sloppy drafting calls for special care in applying the principle, since it cannot be assumed that logically-impelled implications were truly intended.

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[41] The book quoted Lopes LJ in *Colquhoun v. Brooks* [1887] QBD 400 at 406 who said:

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The *exclusio* is often the result of inadvertence or accident and the maxim ought not to be applied where its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice.

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A [42] In the light of the inconsistencies which have been highlighted above, the maxim *expressio unius est exclusio alterius* should not have been applied to exclude the rules of natural justice in this case.

B **Conclusion**

C [43] In the circumstances, we agreed with the decision of the Tribunal that the appellant had been wrongly removed from the membership of the respondent. The appeal by the appellant was therefore allowed. The decision of the High Court was set aside and the decision of the Tribunal was restored subject to the substitution of the word “dibenarkan” for the words “layak dipertimbangkan”.

D [44] Costs to the appellant was fixed at RM5,000 in respect of this appeal and in the High Court. The deposit to the appellant to account of cost.

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